

Written Testimony before the Aging Committee

February 24, 2011

SB 620 AN ACT CONCERNING A PLAN TO ENCOURAGE "AGING IN PLACE"

SB 620 proposes to establish a task force that appears would duplicate the mission of the current Long-Term Care Planning Committee (LTCP), established in 1998 by the legislature. The LTCP Committee is composed of executive agency representatives and chairmen and ranking members of several legislative committees. The legislature further put in place the Long Term Care Advisory Council to advise the Planning Committee, composed of a mix of two independent state agencies (the Commission on Aging and the Long-Term Care Ombudsman's Office) and various long-term care industry, labor, and elderly interest groups. Over the years, both entities have added members, so that now the Planning Committee has 23 members and the Advisory Council 27.

The Planning Committee's original charge was to create a long-term care plan for the elderly and study various elderly-related issues, which was later expanded to include all disabled people. The Committee has produced a number of plans as required, to address at least three of the components of the long-term care system: home and community-based services, supportive housing, and nursing facilities and oversaw the development of an extensive and comprehensive study of these issues. Therefore, if additional specific issues need to be addressed, they should come under the cognizance of the Long-Term Care Planning Committee.

Further, the time constraints in the proposed legislation are unreasonable given the massive efforts required in research and preparation not only by the administrative staff assigned, but also of the staffs of the departments under whose cognizance the specific areas of inquiry fall.

***SB 973 AN ACT CONCERNING THE DETERMINATION OF UNDUE HARDSHIP
FOR PURPOSES OF MEDICAID ELIGIBILITY***

The department opposes SB 973 as written because it does not reflect language that was agreed upon by the department and attorneys representing elderly clients and nursing homes.

While the language in subsection (c) of this bill largely mirrors the language in federal law, without further interpretive language, this bill leaves the state open to funding

nursing home costs for individuals who deliberately impoverish themselves to avoid paying for their long-term care costs.

The Centers for Medicare & Medicaid Services (CMS), the federal oversight agency for Medicaid, allows the states flexibility in their interpretations of the federal law. Accordingly, it is imperative that the state be able to enforce the federal transfer of asset penalties for transfers of assets that are made for the purpose of qualifying for Medicaid. The bill as written does not contain any limits on the ability of applicants to utilize the exception therefore transfer of asset penalties are rendered meaningless. Nursing facility costs accrued by wealthy people who have given away all of their money to their children will consequently be improperly shifted to the state. Given the condition of the state's fiscal climate we cannot support shifting costs to the state's general fund.

The attached substitute language we are proposing reflects an agreement reached between DSS staff and attorneys representing elderly clients and nursing homes. This language is the result of several months of discussion aimed at balancing two competing interests: the needs of elderly individuals who may legitimately qualify for the exception and the state's need to ensure that transfer of asset penalties can be applied when appropriate. We urge you to accept this substitute language in place of the language in this bill.

You will note that, in our attached proposed substitute language, there are provisions that are very important to the financial health of nursing facilities. Currently, nursing facilities are unable to file undue hardship requests on behalf of incapacitated residents because they are unable to consent. When residents are subject to a penalty period and the residents don't have any funds, the nursing facilities don't get paid. Language in the alternative bill requires DSS, upon the request of a nursing facility, to grant an extension of time to request an undue hardship waiver to allow a representative to be authorized or legally appointed to act on behalf of the individual. The Department's substitute language also assists elderly individuals who need additional time to file their claims for undue hardship under certain circumstances.

We urge you to accept our proposed substitute language and welcome the opportunity to discuss the proposal further with members of the committee.

HB 6348 AN ACT CONCERNING GRANDPARENTS' RIGHTS

This bill would increase the payment standard for child only assistance units in the Temporary Family Assistance (TFA) program to the foster care rate paid by the Department of Children and Families.

The department had previously estimated that the cost would be approximately \$33 million. Therefore we must oppose the bill due to the significant costs associated with providing such a benefit increase.

DSS Proposed Substitute Language:

SB 973 AN ACT CONCERNING THE DETERMINATION OF UNDUE HARDSHIP FOR PURPOSES OF MEDICAID ELIGIBILITY.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 17b-261a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2011*):

(a) Any transfer or assignment of assets resulting in the imposition of a penalty period shall be presumed to be made with the intent, on the part of the transferor or the transferee, to enable the transferor to obtain or maintain eligibility for medical assistance. This presumption may be rebutted only by clear and convincing evidence that the transferor's eligibility or potential eligibility for medical assistance was not a basis for the transfer or assignment.

(b) Any transfer or assignment of assets resulting in the establishment or imposition of a penalty period shall create a debt, as defined in section 36a-645, that shall be due and owing by the transferor or transferee to the Department of Social Services in an amount equal to the amount of the medical assistance provided to or on behalf of the transferor on or after the date of the transfer of assets, but said amount shall not exceed the fair market value of the assets at the time of transfer. The Commissioner of Social Services, the Commissioner of Administrative Services and the Attorney General shall have the power or authority to seek administrative, legal or equitable relief as provided by other statutes or by common law.

[(c) The Commissioner of Social Services may waive the imposition of a penalty period when the transferor (1) in accordance with the provisions of section 3025.25 of the department's Uniform Policy Manual, suffers from dementia at the time of application for medical assistance and cannot explain transfers that would otherwise result in the imposition of a penalty period; or (2) suffered from dementia at the time of the transfer; or (3) was exploited into making such a transfer due to dementia. Waiver of the imposition of a penalty period does not prohibit the establishment of a debt in accordance with subsection (b) of this section.]

(c) (1) The Department shall notify individuals applying for long-term care services about the possibility of obtaining an undue hardship exception. This notification shall be part of the preliminary decision notice that the Department sends to the individual when it determines that he or she has made an improper transfer of assets resulting in a penalty period.

(2) The individual has 15 days from the date of the notice described in subdivision (1) of this subsection to claim undue hardship or to otherwise rebut the Department's decision to impose a penalty period. The Department shall grant an extension if the individual so requests, and shall grant subsequent requests if such requests are reasonable.

(3) If the individual or the individual's authorized representative claims undue hardship or rebuts the Department's preliminary decision to impose a penalty period, the Department has ten days from the receipt of such claim or rebuttal to send an interim decision notice to the individual stating that it is either upholding or reversing its preliminary decision. This notice shall inform the individual that the Department is either reversing its preliminary decision and is not imposing a penalty period with respect to long-term care services or upholding its preliminary decision and a penalty period is being established during which Medicaid will not pay for long-term care services.

(4) If the individual does not claim undue hardship or rebut the Department's preliminary decision to impose a penalty period, the Department sends the individual a final decision notice regarding the penalty period and the undue hardship determination at the time of the disposition of the Medicaid application. This notice contains all the elements of the preliminary notice, and a description of the individual's appeal rights. An individual who requests an administrative hearing as part of the appeals rights following a final decision regarding a penalty period may present a claim for undue hardship as part of such request, and such claim for undue hardship shall be accepted for review by the hearing officer.

(5) In addition to the procedures for claiming undue hardship set forth in this subsection, and notwithstanding the time limitations contained therein, an individual may file a claim for undue hardship within 60 days after the individual receives a notice as described in paragraphs (A), (B) or (C) of subdivision (1), subsection (d) of this section, which may establish that the individual would be deprived of medical care such that his or her health or life would be endangered or deprived of food, clothing, shelter or other necessities of life if the penalty were not waived.

(d) An individual, as described in subdivision (1) of this subsection, is not penalized based on a transfer of assets made by the individual or his or her spouse if denial or discontinuance of payment for services would create an undue hardship, which exists if the individual would be deprived of medical care, such that his or her health or life would be endangered; or food, clothing, shelter or other necessities of life. Waiver of the imposition of a penalty period does not prohibit the establishment of a debt in accordance with subsection (b) of this section.

(1) When an individual would be in danger of losing or being denied payment for long-term care facility or equivalent services, solely because of the imposition of a penalty period, the Department does not impose such penalty under the following conditions, which may establish that the individual would be deprived of medical care such that his or her health or life would be endangered or deprived of food, clothing, shelter or other necessities of life if the penalty were not waived:

(A) The long-term care facility or medical institution has notified the individual of its intent to initiate the individual's discharge due to non-payment; or

(B) The individual is receiving long-term care home and community-based services being provided under a Medicaid waiver and the medical provider has notified the individual of its intent to

terminate such home and community-based services due to the imposition of a penalty period resulting from a transfer of assets; or

- (C) The individual needs long-term care services and, due to a transfer of assets resulting in the imposition of a penalty period, either (i) a long-term care facility has refused to accept the individual, or (ii) the home and community-based services provider has refused to accept the individual as a client; and
- (D) There is no family member or other individual or organization able and willing to provide care to the institutionalized individual.

(2) Notwithstanding subdivision (1) of this subsection, undue hardship shall not be found when:

- (A) the transferor deliberately impoverished himself or herself to avoid paying for long-term care costs;
- (B) a transfer that resulted in a transfer-of-asset penalty was made by the individual's legal representative; or
- (C) a transfer that resulted in a transfer-of-asset penalty was made by the record owner of a jointly-held asset

(3) Notwithstanding subdivision (2) of this subsection, undue hardship may be found if the transferor

- (A) suffered from dementia or other cognitive impairment at the time of application for medical assistance and cannot explain transfers that would otherwise result in the imposition of a penalty period; or
- (B) suffered from dementia or other cognitive impairment at the time of the transfers; or
- (C) was exploited into making the transfers, due to the dementia or other cognitive impairment; or
- (D) was exploited by the transferor's legal representative or by the record owner of a jointly-held asset who made unauthorized transfers.

(e) The individual or the individual's authorized representative may give permission for the long-term care facility in which he or she is residing to file a claim for undue hardship on behalf of the individual.

- (1) If the long-term care facility certifies, and the Department agrees, that the individual is incapacitated and has no authorized or legally-appointed representative, family member or friend to act on his or her behalf, the long-term care facility may request, on behalf of the individual, an extension of time to file a claim for undue hardship. In such cases, the Department shall grant such extension to allow a representative to be authorized or legally appointed to act on behalf of the individual.
- (2) In addition to filing an undue hardship claim on behalf of the individual, the long-term care facility may, with the consent of the individual or the

individual's legally-appointed or authorized representative, present information on behalf of the individual and represent the individual throughout the undue hardship claim process.

([d]f) The Commissioner of Social Services, pursuant to section 17b-10, shall implement the policies and procedures necessary to carry out the provisions of this section while in the process of adopting such policies and procedures in regulation form, provided notice of intent to adopt regulations is published in the Connecticut Law Journal not later than twenty days after implementation. Such policies and procedures shall be valid until the time final regulations are effective.